SEE HUA REALTY BHD

v.

SEE HUA NEWS HOLDING SDN BHD

HIGH COURT SABAH & SARAWAK, KUCHING
LAU BEE LAN J
[ORIGINATING PETITION NO: 26-02-2003-II]
21 JULY 2006

CIVIL PROCEDURE: *Discovery - Inspection of documents - Whether direction could be made under O. 88 r. 7 Rules of the High Court 1980 - Whether directions for discovery and inspection allowed - Nature of complaints in s. 181 petition - Powers of the court - Consideration of - Whether prayers sought for allowed*

The petitioner,by a summons for directions pursuant to O. 88 r. 7 of the Rules of the High Court 1980, applied for directions as contained in encl. 8, *inter alia*, (i) the parties at the hearing of the petition be entitled to cross examine the makers of documents filed as evidence in affidavits (Prayer 3); (ii) for parties to attend case management whereupon the court may make directions as to (a) the delivery of lists of documents; (b) the inspection and exchange of bundles of documents; and (c) the determination of witnesses who shall attend such hearing (Prayer 5) ; and (iii) the parties be at liberty to apply for discovery and inspection of documents in accordance with the Rules of the High Court 1980 (Prayer 7). The petitioner submitted that the court has the power to make such orders as it thinks fit including the directions sought under prayers 3, 5 and 7 above since it was an application made pursuant to O. 88 r. 7 of the RHC and not O. 24 of the RHC. The respondents however submitted that O. 88 r. 7 of the RHC does not empower the court to make an order for discovery because the discovery process has been provided for under a different rule (O. 24) and if it was intended that O. 88 r. 7 would include the power to make discovery, that would have been provided for in O. 88 r. 7(3) where the rules actually note that directions should be given for the publication of notices and the making of any inquiry; and that the discovery process was limited to writ actions but does not cover all other originating applications. The petitioner, however, submitted that in a s. 181 petition, the court has to be careful to allow for maximum evaluation, hence why the three said prayers 3, 5 and 7 of encl. 8 were absolutely necessary for a fair hearing of the s. 181 petition.

Held (allowing prayer 3, prayer 5(a), prayer 5(b) as amended, prayer 5(c) and disallowing prayer 7):

(1) Summons for directions was made pursuant to O. 88 r. 7 of the RHC whilst discovery and inspection of documents is provided under O. 24 of the RHC; thus a direction could not be made under O. 88 r. 7 by the court so as to be in conflict with the provision in O. 24 as both these provisions are contained in the same legislation. (para 8)

(2) The court had looked at the documents but those were documents that were produced by the parties; further there was no indication that any order for discovery had been made in *Kumagai*'s case. The fact that the judge had looked at the documents did not mean that an order for discovery had been made. Having considered the nature of the complaints in the s. 181 petition and the wide powers of the court under O. 88 r. 7(3) of the RHC to give such directions as it thinks fit, in the interest of justice and to ensure a fair trial, this court allowed order in terms of (i) prayer 3; (ii) prayer 5 (a); (iii) prayer 5(b) as amended *ie*, the words 'the inspection and' deleted which means that there will only be an exchange of bundles of documents; and (iv) prayer 5(c). However, prayer 7 of encl. 8 has been disallowed. (para 15)

Case(s) referred to:

Kumagai Gumi Co Ltd v. Zenecon-Kumagai Sdn Bhd & Ors and Another Application [1994] 2 MLJ 789 ***(refd)***

Lai Kim Loi v. Datuk Lai Fook Kim & Anor [1989] 2 CLJ 107; [1989] 1 CLJ (Rep) 61 SC ***(refd)***

Maril-Rionebel (M) Sdn Bhd v. Perdana Merchant Bankers Bhd [2001] 3 CLJ 248 CA ***(refd)***

Re Kong Thai Sawmill (Miri) Sdn Bhd Ling Beng Sung v. Kong Thai Sawmill (Miri) Sdn Bhd & Ors [1975] LNS 147 ***(refd)***

Yeong Peng Wah v. Bahal Singh [1961] 27 MLJ 316 ***(refd)***

Legislation referred to:

Companies Act 1965, s. 181

Rules of the High Court 1980, O. 24, O. 88 rr. 5(h), 7(3), O. 92 r. 4

Other source(s) referred to:

Malaysian High Court Practice 2001 Desk Edition 1, para 24.1.2, p 826

For the petitioner - Christina Eng; M/s CJ Eng
For the Provisional Liquidators for 1st respondent (watching brief) - Alvin Chong; M/s Alvin Chong & Partners
For the 2nd-5th respondents - George Lo; M/s George Lo & Partners

Reported by Suhainah Wahiduddin

JUDGMENT

Lau Bee Lan J:

Re: Summons for directions pursuant to O. 88 r. 7 Rules of the High Court 1980 – encl. 8

[1] The petitioner, See Hua Realty Berhad has by a summons for directions pursuant to O. 88 r. 7 of the Rules of the High Court 1980 ("the RHC") applied for directions as contained in encl. 8 which is reproduced:

1. at the hearing of the Petition, evidence in chief be given firstly by the reading of the Petition, the affidavit verifying petition and any other affidavits filed by the parties to this action and secondly by way of *viva voce* evidence;

2. the parties are at the hearing of the petition entitled to cross-examine the deponents of all affidavits by way of giving to notice of an intention to so cross-examine, which notice shall be served on the deponent concerned not less than 14 days before the date fixed for the hearing of the Petition;

3. subject to the provisions of prayer (5) below, the parties are at the hearing of the petition entitled to cross-examine the makers of documents filed as evidence in affidavits;

4. that the Court do fix a date for the hearing of the Petition;

5. that the Court do fix a return date not less than 30 days before the hearing of the Petition for parties to attend case management whereupon the Court may make directions as to:

   (a) the delivery of lists of documents;

   (b) the inspection and exchange of bundles of documents; and

   (c) the determination of witnesses who shall attend such hearing

A

6. parties be at liberty to issue writs of subpoenas *duces tecum* and/or *ad testificandum* against all such persons as may be necessary and whose attendance in Court is required for the purpose of giving evidence, and the evidence of such persons shall be given *via voce*;

B

7. the parties be at liberty to apply for discovery and inspection of documents in accordance with the Rules of the High Court 1980;

8. the parties be at liberty to apply for such further and/or other directions as may be necessary or expedient;

C

9. the costs of this application be costs in the cause;

10. such further or other directions or orders as this Court deems fit to make or grant.

D

[2] On 18 April 2006 after hearing parties the court granted the following directions:

(1) Prayer 1 as amended – "At the hearing of the petition, evidence in chief be given firstly by the reading of the petition,

E

the affidavit verifying petition; secondly; by the reading of the affidavit(s) in opposition filed by the respondents; thirdly, by the reading of any affidavit(s) in reply filed by the petitioner and finally, by way of *viva voce* evidence."

F

(2) Prayer 2 – after the words "all affidavits" to insert the words "filed pursuant to item 1 of this order" and to delete the words "by way of giving to *(sic)* notice of an intention to so cross-examine, which notice shall be served on the deponent concerned not less than 14 days before the date fixed for the

G

hearing of the petition".

(3) There is no order in respect of item 6.

(4) Prayer 9 – costs be in the cause.

H

[3] The only disputed items are in respect of prayers 3, 5 and 7. After hearing the submissions of the learned counsel for the petitioner and the 2nd-5th respondents, the court's findings and evaluation are as follows. Ms. Christina Eng, learned counsel for the petitioner submitted initially that the court has in the interest

I

of justice the inherent power to grant this direction pursuant to O. 92 r. 4 of the RHC and she sought time to secure the

authorities. Ms. Eng later submitted that the court has the power to make such orders as it thinks fit including the directions sought under prayers 3, 5 and 7 of encl. 8 since it is an application made pursuant O. 88 r. 7 of the RHC and not O. 24 of the RHC.

[4] In support, Ms. Eng cited the case of *Lai Kim Loi v. Datuk Lai Fook Kim & Anor* [1989] 2 CLJ 107; ([1989] 1 CLJ (Rep) 61) at pp. 116-117; (p. 69):

> As for the procedure, it is provided in O. 88 r. 5 of our Rules of the High Court 1980 that certain applications under the Companies Act 1965, including an application under s. 181 of the said Act for relief in cases of oppression, must be by petition. After presentation of the petition, the petitioner must take out a summons for directions under r. 7 of O. 88. On the hearing of the summons the court may by order give such directions as to the proceedings to be taken before the hearing of the petition as it thinks fit including, in particular, directions for the publication of notices. In other words, a petition under s. 181 of the said Act cannot be published without the prior order of the court, as was done in this case.

[5] Mr. George Lo, learned counsel for the 2nd to the 5th respondents submitted that O. 88 r. 7 of the RHC does not empower the court to make an order for discovery because the discovery process has been provided for under a different rule (O. 24) and if it was intended that O. 88 r. 7 would include the power to order discovery, that would have been provided for in O. 88 r. 7(3) where the rules actually note that directions should be given for the publication of notices and the making of any inquiry; and that the discovery process is limited to writ actions but does not cover all other originating applications.

[6] Order 88 r. 7(3) of the RHC states:

> (3) On the hearing of the summons the Court may by order give such directions as to the proceedings to be taken before the hearing of the petition as it thinks fit including in particular, directions for the publication of notices and the making of any inquiry.

[7] I am mindful of the words, "such directions as to the proceedings to be taken before the hearing of the petition as it thinks fit" contained in para. 3 of O. 88 r. 7 which appears to indicate that the court has a wide discretion as to the kind of the directions it may desire to so order. I agree with Mr. Lo's

submission regarding the exclusion of O. 24 as a direction which is made pursuant to O. 88 r. 7(3). This is supported by the textbook authority of *Malaysian High Court Practice 2001 Desk Edition 1* at para 24.1.2 p. 826:

> [24.1.2] **Effect of the rule**
>
> This rule comes into effect at the close of pleadings, as to which, see O. 18 r. 20 and notes thereto. **It provides for mutual discovery in an action begun by writ.** Unlike the former rule, it is no longer necessary for any party to apply to court for an order compelling the other party to make discovery and give inspection of the documents which are or have been in their possession, custody or power relating to the matters in question in the action. An application to court is necessary where a party fails to make discovery. Therefore, unless the parties agree to dispense with or limit the discovery of documents (O. 1 r. 1(2)) or the action arose out of an action on land involving vehicles (O. 2 r. 2(2)), they must each make full discovery. (emphasis added).

[8] I wish to add that the summons for directions is made pursuant to O. 88 r. 7 of the RHC whilst discovery and inspection of documents is provided under O. 24 of the RHC; thus a direction cannot be made under O. 88 r. 7 by the court so as to be in conflict with the provision in O. 24 as both these provisions are contained in the same legislation. The court has to interpret the 2 provisions as a harmonious whole. I draw support for the view from the judgment of Ong J, which I agree, in the case of *Yeong Peng Wah v. Bahal Singh* [1961] 27 MLJ 316 where at p. 317 para. G - I left-hand column His Lordship stated:

> it is a cardinal rule of construction that in construing any particular clause in a statute one has to look to its connection with other clauses in the same statute, and the conclusions which, on comparison with other clauses, many (sic – may) reasonably and obviously be drawn. If comparison of one clause with others in the statute makes a certain proposition clear and undoubted, the Act must be construed so as to make it a consistent and harmonious whole. If after all it turns out that that cannot be done, the construction that produces the greatest harmony and the least inconsistency is that which ought to prevail. (See *Attorney-General v. Sillom*).

[9] Mr. Lo has referred the court to the case of *Maril-Rionebel (M) Sdn Bhd v. Perdana Merchant Bankers Bhd* [2001] 3 CLJ 248 and submitted that although it is a company winding-up petition, it was nonetheless a petition and the learned judge held that procedure for writ actions like discovery and interrogations cannot be imported into the company winding-up petition.

[10] In the Court of Appeal case of *Maril-Rionebel (supra)*, His Lordship Abdul Hamid Mohd, JCA at p. 268 opined:

> **It is important that the procedure applicable in a writ action should not be incorporated into a winding up proceeding.** It is not meant to be. Appearance is required (and provided for) in a writ action, so that the plaintiff will know whether to take a judgment in default or not. If an appearance is filed, followed by defence, then at the close of the pleadings, the plaintiff should apply for directions and ask for the case to be set down for trial. In other words, he asks for a trial date. That is not necessary in a winding up petition because the hearing date has been given even before the petition is issued. **That is why there is no provision for appearance, defence, summons for directions, setting down for trial etc in a winding up proceeding.** (emphasis added).

[11] The observation of the Federal Court, "It is important that the procedure applicable in a writ action should not be incorporated into a winding up proceeding." is clear in its terms. Therefore, with regret, I cannot agree with Mr. Lo's reasoning as a basis that the court is precluded from giving directions governing discovery and inspection for a s. 181 petition as is the case here. Further, in a company's winding up petition there is no provision for summons for directions as has been confirmed by the Federal Court in *Maril-Rionebel (supra)*. However, this is different in the case of an application under s. 181 of the Companies Act 1965 where the application must be made by petition pursuant to O. 88 r. 5(h) of the RHC and after presentation of the petition, it is mandatory that summons for directions be taken out by the petitioner under O. 88 r. 7 of the RHC as stated in *Lai Kim Loi*'s case *(supra)*. Notwithstanding that the court is empowered to grant directions, in my view the directions for discovery and inspection of documents cannot be allowed for the reason I have alluded to earlier.

[12] Ms. Eng has submitted that the complaints under s.181 petition include:

(i) the respondents have taken over the companies that had once belonged to the petitioner;

(ii) and one of the main issues being whether monies claimed to be injected by 2nd respondent was truly injected into the 1st respondent;

(iii) the respondents have alleged the petitioner's assets transferred has a shortfall running into millions;

(iv) allegations of duress;

(v) that the 2nd to 5th respondents had run down the 1st respondent and its subsidiaries companies;

(vi) denial of access to information and exclusion from management; and

(vii) incorporation of new companies so as to drain the coffers of the 1st respondent's coffers.

[13] Therefore, learned counsel added that these are contentious issues and for almost of all of these issues, since the companies and documents are in the hands and control of the respondents, there can be no question of a fair trial unless the respondents are made to produce the documents in their possession.

[14] Ms. Eng has referred to the authority of *Re Kong Thai Sawmill (Miri) Sdn Bhd Ling Beng Sung v. Kong Thai Sawmill (Miri) Sdn Bhd & Ors* [1975] LNS 147 as authority for prayer 3 in encl. 8. I agree with Mr. Lo that this authority is in respect of cross-examination of deponents of affidavits and there is no issue as to the cross-examination of the deponents of the affidavits because prayer 2 of encl. 8 has been agreed by the parties.

[15] Ms. Eng also referred to *Kumagai Gumi Co Ltd v. Zenecon-Kumagai Sdn Bhd & Ors and Another Application* [1994] 2 MLJ 789 and submitted that when it conies to s. 181 petition, the court has to be careful to allow for maximum evaluation hence, why prayers 3, 5 and 7 of encl. 8 are absolutely necessary for a fair hearing of the s. 181 petition. In this regard, Mr. Lo however submitted that the court looked at the documents but those were

documents that were produced by the parties; further there was no indication that any order for discovery had been made in the *Kumagai*'s case and the fact that the judge had looked at the documents does not mean that an order for discovery had been made. I concur with Mr. Lo.

[16] For the reasons above, having considered the nature of the complaints in the s. 181 petition and the wide powers of the court under O. 88 r. 7(3) of the RHC to give such directions as it thinks fit, in the interest of justice and to ensure a fair trial, I allow order in terms of:

(i) prayer 3;

(ii) prayer 5(a);

(iii) prayer 5(b) as amended ie, the words "the inspection and" are deleted which means that there will only be an exchange of bundles of documents; and

(iv) prayer 5(c).

[17] However, prayer 7 of encl. 8 is disallowed.